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August 16, 2019

Via ECFS

Marlene J. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 - 12th Street, SW
Washington, DC 20054

Re: Commonwealth Edison Company's Motion for Leave to Respond to Reply (Proceeding Number 19-170; Bureau ID Number EB-19-MD-005)

Dear Ms. Dortch:

Please find attached Commonwealth Edison Company's Motion for Leave to Respond to Reply to be filed in the above referenced proceeding.

Please contact the undersigned counsel if you have any questions regarding this submission.

Sincerely,

Kathleen M. Slattery
Attorney for Commonwealth Edison Company

Enclosure

cc: Rosemary McEnery, Enforcement Bureau
Adam Suppes, Enforcement Bureau

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Crown Castle Fiber LLC, *Complainant,*	)	
v.	)	**Proceeding Number 19-170** **Bureau ID Number EB-19-MD-005**
Commonwealth Edison Company, *Defendant*	)	

MOTION FOR LEAVE TO RESPOND TO REPLY

Pursuant to Section 1.729 of the Commission's rules,[1] Commonwealth Edison Company ("ComEd") respectfully requests leave to respond to new allegations made in the August 5, 2019 "Reply to Respondent's Answer to Complainant's Pole Attachment Complaint – Unlawful Rates" ("Reply") filed by Crown Castle Fiber LLC ("Crown Castle") in the above-captioned proceeding. In support of the foregoing, ComEd states as follows:

The Reply makes several new allegations about important issues to which ComEd has had no opportunity to respond. First, Crown Castle alleges for the first time in its Reply that "any" attachment that Crown Castle installs on ComEd's poles, including the wireless antennas Crown Castle installs but does not operate, are subject to federal Pole Attachment Act protections.[2] This issue is thus similar to the "billboard" issue the Supreme Court declined to answer in *National Cable & Telecommunications Ass'n, Inc. v. Gulf Power Co.*, 534 U.S. 327

[1] 47 C.F.R. §1.729.
[2] Reply at 1-2.

(2002),[3] and raises the additional question whether an attachment to be operated by another entity requires that other entity to file an attachment application. It is thus a critical issue of first impression for the Commission that requires full analysis.

Second, in response to issues raised by ComEd's Answer, the Reply for the first time fully explained Crown Castle's "RF transport service," and that explanation raises additional important issues to which ComEd has had no chance to respond. For example, although Crown Castle's Complaint suggested that Crown Castle was already using its wireless attachments to provide this RF transport service,[4] the Reply states that Crown Castle only "plans to provide" RF transport service.[5] Thus, all of the numerous antennas and other wireless attachments that are the subject to this Complaint proceeding apparently are not being used at this time to provide RF transport service or any service at all. Furthermore, while Crown Castle cites caselaw that it can provide service on a wholesale basis and still potentially qualify as a common carrier with attachment rights, Crown Castle fails to establish that it "holds [itself] out to service indifferently all potential users," which is the other common carriage prerequisite specified in this ruling.[6] It

[3] At page 342, the Court states:

> Respondents insist that "any attachment" cannot mean "any attachment." Surely, they say, the Act cannot cover billboards, or clotheslines, or anything else that a cable television system or provider of telecommunications service should fancy attaching to a pole. Since the literal reading is absurd, they contend, there must be a limiting principle.
>
> The FCC did not purport either to enunciate or to dis-claim a specific limiting principle, presumably because, in its view, the attachments at issue here did not test the margins of the Act. The term "any attachment by a cable television system" covers at least those attachments which do in fact provide cable television service, and "any attachment by a . . . provider of telecommunications service" covers at least those which in fact provide telecommunications. Attachments of other sorts may be examined by the agency in the first instance.

Gulf Power Co., 534 U.S. at 342.
[4] June 19, 2019 Complaint at ¶4.
[5] Reply at 21.
[6] Reply at 21, quoting *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 533 F.2d 601, 608-09 (D.C. Cir. 1976).

is impossible to determine whether a service that is provided to a limited class of customers is a telecommunications service or a private carrier service offering without examining the contracts underlying Crown Castle's offering of this service. Crown Castle's RF transport service agreements with wireless carriers for dedicated connectivity between cell sites and switching centers appear to be private carrier arrangements, as Crown Castle has not posted its standard terms and conditions on a readily accessible public web site.[7] ComEd intends to request further discovery to review Crown Castle's agreements with the wireless carriers for these services and to review Crown Castle's FCC Forms 499A filed with the Universal Service Administrative Company (USAC). In any event, ComEd has not had a chance to respond to the very important threshold issues raised by these new allegations.

Third, Crown Castle's Reply claims that for purposes of calculating a regulated wireless attachment rate: (1) only certain attachments located in the usable space on the pole should be counted; (2) "ancillary" equipment should not be counted; (3) space above the pole should not be counted; and apparently (4) necessary safety code clearances should not be counted.[8] The only FCC decision the Reply cites to support its contentions is a 1985 Order addressing the Cable Rate, which was the only rate in effect at that time. The Cable Rate, unlike the Telecom Rate, apportions pole costs solely based on the amount of usable space that is occupied, which in the Commission's view rendered only usable space attachments meaningful. Cable attachments moreover include "ancillary" equipment only rarely, and only in the unusable space.[9] Wireless

[7] *See* 47 CFR § 42.10 (interexchange, interstate carriers must post their rates, terms and conditions on a readily accessible web site).
[8] Reply at 7-10. In two of the Reply's footnotes, Crown Castle explains the large number of facilities it has attached to ComEd's poles, which include antennas, pole extension mounts, radios, load center parts, fiber interconnect terminals, long copper clad steel rods, vertical risers, RRUS facilities, hybrid couplers, power supplies, disconnect boxes, outdoor telco boxes, power cables, fiber cables, ground rods, flexi zone radios, and U-Guards. Reply at n. 23 and n. 28.
[9] Reply at n. 24.

attachments, on the other hand, include significant attachments of "ancillary" equipment on every single "node" pole with an antenna, and the "ancillary" antenna riser and power cables very often occupy the usable space on these poles. The Commission has never calculated a wireless attachment rate, so that the issue of which attachments to count for purposes of calculating the rate is a matter of first impression. Additional analysis of this issue is therefore warranted, including an analysis of how other jurisdictions like California have resolved this issue.

Fourth, the Reply for the first time provides calculations associated with ComEd's so-called "appurtenances" and with its pole heights, which require additional scrutiny. For example, Crown Castle has used the wrong universe of poles to calculate the average pole height.[10]

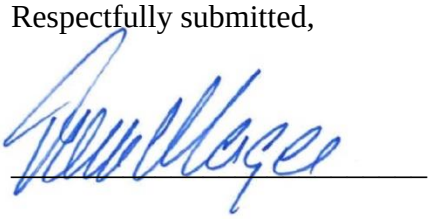
Fifth, Crown Castle's Reply for the first time fully explains the connections between the entities that signed the three agreements at issue and complainant Crown Castle, and explains for the first time the authority these intermediate entities had through the years to provide services in Illinois.[11] The Reply explained these connections only because ComEd's Answer noted the numerous deficiencies in Crown Castle's Complaint.[12] ComEd should be entitled to respond to these new allegations, which should have been included in Crown Castle's Complaint in the first place.

It would be unfair and prejudicial not to provide ComEd an opportunity to respond to these new allegations. Permitting ComEd to respond would also supplement the record and legal

[10] Reply at 16-17 and Attachments A and B, CCF 487-492.
[11] Reply at 27-36.
[12] *See* July 22, 2019 ComEd Answer at 6-15, Affirmative Defenses ¶¶15-33.

analysis of these important issues. ComEd therefore respectfully requests leave to file a response to these new allegations in Crown Castle's Reply.

Respectfully submitted,



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August 16, 2019

CERTIFICATE OF SERVICE

I, Kathleen M. Slattery, hereby certify that on this 16th day of August 2019, a true and authorized copy of Commonwealth Edison Company's Motion for Leave to Respond to Reply was served on the parties listed below via electronic mail and was filed with the Commission via ECFS.

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